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13

14 UNITED STATES DISTRICT COURT  
15 CENTRAL DISTRICT OF CALIFORNIA  
16

17 GIGANEWS, INC., a Texas corporation;  
and LIVEWIRE SERVICES, INC., a  
18 Nevada corporation,

19 Plaintiffs,

20 v.

21 PERFECT 10, INC., a California  
corporation; NORMAN ZADA, an  
22 individual; and DOES 1-50, inclusive,

23 Defendants.  
24

Case No.: 2:17-cv-05075-AB (JPR)

**PLAINTIFFS' OPPOSITION TO  
DEFENDANT PERFECT 10, INC.  
AND NORMAN ZADA'S MOTION  
FOR SUMMARY JUDGMENT OR,  
IN THE ALTERNATIVE,  
PARTIAL SUMMARY  
JUDGMENT**

Date: December 14, 2018  
Time: 10:00 a.m.  
Courtroom: 7B, 350 West First Street,  
Los Angeles, CA 90012

25 [REDACTED]  
26  
27  
28

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

The Court should deny Defendants' motion: there is ample evidence to support the causes of action that Defendants challenge, and their attack on the claims is little more than a rant resting on numerous irrelevant and unsupportable assertions.

The Court is already familiar with much of the evidence in this case. In the year leading up to the fee award<sup>1</sup> in *Perfect 10, Inc. v. Giganews, Inc.*, C.D. Cal. No. CV 11-7098 ("Related Case"), Zada took \$1.75 million out of Perfect 10's bank account, \$850,000 of which Zada admits he removed because of Perfect 10's loss on summary judgment. He then claims to have "bought" all of Perfect 10's physical assets, with no certain knowledge of what assets he purchased or any concern over their value. Zada admitted that he made the transfers to avoid enforcement of the Court's judgment and the resulting "interference" with Perfect 10's business. He also removed an additional \$454,002.05 from Perfect 10's account with the judgment unpaid. These were all classic fraudulent transfers to hinder a creditor's collection against Perfect 10.

Discovery has revealed further evidence of fraud that would enable the jury to rule for Plaintiffs at trial:

- While awaiting final discovery sanctions and a briefing schedule for the fee motion, Melanie Poblete, Zada's bookkeeper, close assistant, and rent-free housemate, created documents to mischaracterize amounts Zada removed from the company as repayments of loans, contrary to Perfect 10's tax reporting for *years* to the federal government.
- Just *hours* after the Court's fee award on March 24, 2015, [REDACTED]

<sup>1</sup> The District Court awarded about \$5.6 million; with an award of appellate fees by the Ninth Circuit and interest, the award has climbed to about \$6.5 million.



- The asset transfer was a sham as well: [REDACTED]

[REDACTED]; they never changed location; and  
Perfect 10's books [REDACTED]  
[REDACTED]

Plaintiffs can establish fraud under both “actual” and “constructive” fraud theories as to all transfers, as Plaintiffs set forth below. The Court should deny Defendants’ motion for summary judgment completely.<sup>2</sup>

## II. FACTUAL BACKGROUND

### A. Perfect 10 and Norman Zada Have a Bad-Faith Litigation History.

This case is about a series of fraudulent transfers from Perfect 10, Inc. to its principal, Norman Zada, to avoid paying a fee award to Giganews and Livewire. Mr. Zada is the president of Perfect 10. SUF175. Perfect 10 and Norman Zada purchase copyrights and filed dozens of lawsuits for copyright infringement, including suits against Visa, MasterCard, Google, Amazon.com, Microsoft, Tumblr, and others. SUF176. As part of their business model, they sought to extract settlements from businesses that otherwise would incur staggering attorneys’ bills to defend Perfect 10’s unmeritorious suits, and they further multiplied litigation costs with abusive discovery conduct and motion practice. SUF177. Perfect 10’s statutory damages claims were typically in the billions of dollars owing to the number of images that Perfect 10 claimed to be infringed. SUF178. Perfect 10 never obtained a final victory in a case. It lost the only cases it pursued to a non-settled conclusion. SUF179. The Related Case was one of them.

Perfect 10 filed its original copyright lawsuit against Plaintiffs Giganews and Livewire in 2011, alleging direct and indirect copyright infringement of Perfect 10’s adult images on Plaintiffs’ Usenet services as well as direct and indirect

<sup>2</sup> Though styled as a motion for summary judgment, and not for summary adjudication, Defendants did not move as to Plaintiffs’ third claim, for violating California Civil Code Section 3443. That claim should proceed to a jury trial.



1 trademark infringement and violations of publicity rights Perfect 10 claimed to have  
 2 obtained from its nude models. SUF180 Over the course of that litigation, Perfect  
 3 10 largely lost two motions to dismiss (SUF181-82); brought and lost an early  
 4 motion for partial summary judgment to deny Giganews the safe harbor for online  
 5 service providers under the Copyright Act (SUF185); failed to uncover any  
 6 evidence of infringement in discovery (RJN Ex. 20); lost several motions to compel  
 7 (SUF187, 189, 193-4); had the testimony of three putative expert witnesses,  
 8 including Zada, excluded (SUF200); and was the subject of extensive findings of  
 9 wrongdoing in a sanctions order that awaited implementation at the time Plaintiffs  
 10 in this case won summary judgment. (SUF221.)

11 Throughout the lawsuit, Perfect 10 persistently reargued and lost arguments  
 12 that the Court had repeatedly rejected. *See e.g.*, RJN Ex. 20 at 12 (“Perfect 10  
 13 repeats the arguments Judge Matz and Judge Collins already rejected. . .”). Upon  
 14 discovering that the software application that Perfect 10 used to locate instances of  
 15 alleged infringement on Usenet could easily extract the information that Plaintiffs  
 16 here needed to process Perfect 10’s complaints, Perfect 10—rather than supplying  
 17 this information for processing—instead moved for sanctions against Plaintiffs.  
 18 The Court denied Perfect 10’s motion as “meritless”, “entirely unpersuasive”, “ill-  
 19 considered and overreaching.” SUF196.

20 On November 14, 2014, the Court granted Giganews and Livewire’s motions  
 21 for partial summary judgment, driving the final nail in to the coffin of all Perfect  
 22 10’s claims. SUF201. In one of its orders, the Court observed that Perfect 10’s  
 23 “refus[al] to do what was well within its power” was the actual cause of its claimed  
 24 harm, as opposed to the conduct of either Plaintiff. SUF204. The Court entered  
 25 final judgment for Giganews and Livewire on November 26, 2014. SUF207. On  
 26 March 24, 2015, the Court granted Plaintiffs’ motion for attorney’s fees and  
 27 expenses, awarding Plaintiffs approximately \$5.6 million.<sup>3</sup> SUF224. In that order,

28 <sup>3</sup> The District Court awarded approximately \$5.6 million; with an award of

1 the Court noted : “Perfect 10’s undisputed conduct in this action has been  
2 inconsistent with a party interested in protecting its copyrights. All of the evidence  
3 before the Court demonstrates that Perfect 10 is in the business of litigation, not  
4 protecting its copyrights or ‘stimulat[ing] artistic creativity for the general public  
5 good.’” SUF225. Three-and-a-half years later, Perfect 10 has not voluntarily paid  
6 any part of that judgment. SUF226.

7 **B. Defendants Concealed Perfect 10 Assets from Its Creditors,**  
8 **Including Plaintiffs.**

9 Over the course of its history as a litigation business, when Perfect 10  
10 received settlement proceeds, Zada typically took the money out of the company  
11 within two months, even if Perfect 10 also anticipated significant expenses.  
12 SUF275. When Perfect 10’s bank balance decreased beyond its ability to pay, Zada  
13 would make equity contributions back to the company from his personal accounts  
14 to cover them. SUF276. This had the effect, among other things, of protecting  
15 Perfect 10’s cash from potential unwanted creditors.

16 In early 2014, as Perfect 10 lost motion after motion in its copyright action,  
17 Zada caused Perfect 10 to begin transferring corporate assets to himself in  
18 anticipation of further unfavorable court rulings and a possible judgment for  
19 attorneys’ fees. Zada made ten separate transfers of money, totaling \$2,204,002,  
20 from Perfect 10 to himself. SUF184, 186, 188, 191-92, 195, 198-99, 205, 240, 251.

21 In August 2014, Giganews moved for substantial sanctions. SUF197. The  
22 motion papers identified massive, pervasive misconduct by Perfect 10 and its  
23 counsel. *See id.* That motion remained pending for several months.

24 Zada’s transfers included an \$850,000 transfer just six days after the Court  
25 granted summary judgment in November 2014. SUF205. Zada confessed that he  
26 made this transfer due to the “summary judgment orders” because, after those

27  
28 

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appellate fees by the Ninth Circuit, the award has since climbed to approximately  
\$6.5 million.

1 “orders were issued, [he] did not see any point in keeping more cash than [he and  
 2 Perfect 10] needed in the account.” SUF206. The same day, [REDACTED]  
 3 [REDACTED] Norfield Court mansion that serves as both his residence  
 4 and Perfect 10’s offices. SUF207.

5 With the summary judgment ruling, it also became clear that Giganews  
 6 would seek its attorney’s fees. The district court’s judgment on November 26,  
 7 2014, reflecting proposals by the parties, gave Giganews additional time after the  
 8 judgment to move for fees. SUF208.

9 On December 8 and 9, 2014, with the sanctions issue pending and  
 10 Giganews’s motion for attorney’s fees imminent, Melanie Poblete, Perfect 10’s  
 11 paralegal and bookkeeper, and Zada’s close personal assistant and rent-free  
 12 housemate, [REDACTED]  
 13 [REDACTED] Perfect 10’s  
 14 tax returns, which Zada signed under penalty of perjury: for many years the tax  
 15 returns had consistently identified Zada’s financial contributions to the company [REDACTED]

16 [REDACTED]  
 17 [REDACTED]  
 18 [REDACTED]  
 19 [REDACTED]  
 20 [REDACTED]

21 On February 4, 2015, the Magistrate Judge entered a 55-page order of  
 22 “further interim findings” on the motion for sanctions. SUF221. It stated:  
 23 “Defendants have presented this Court with extensive evidence showing unjustified  
 24 discovery noncompliance, numerous violations of this Court’s orders, and  
 25 pervasive failures by Perfect 10, its attorneys, and the Perfect 10-affiliated  
 26 witnesses. The court will proceed to determine the reasonable amount of monetary  
 27 sanctions, and whether they should be assessed against Perfect 10 and/or its  
 28 counsel.” *Id.* During this month, [REDACTED]

1 [REDACTED] SUF222.

2 On March 24, 2015, the district court issued the attorney's fee award to  
3 Giganews. SUF224. Zada immediately moved into high gear. Mere hours after  
4 the award issued, [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED] thus revealing his  
8 knowledge that those transfers were part of an integrated and pervasive fraudulent  
9 scheme. *Id.*

10 Zada then also drew up corporate minutes purporting to transfer some of  
11 Perfect 10's physical assets to himself for \$20,000. SUF237. A week later, on  
12 April 1, 2015, he did the same for all Perfect 10's remaining physical assets,  
13 ostensibly transferring them to himself for \$50,000. SUF242. Zada admitted that  
14 he caused Perfect 10 to make these transfers because "it would have been totally  
15 disruptive to have those [assets] seized" in satisfaction of the judgment. SUF261.  
16 He needed to "save" the Perfect 10 business from "the judgment." *Id.* The minutes  
17 themselves also state that Zada made the transfer "in light of the recent attorneys  
18 [sic] fees award, to avoid complete disruption" of Perfect 10's legal business.  
19 SUF242.

20 The transfers were a sham. Zada transferred \$70,000 to Perfect 10, but  
21 Perfect 10's records [REDACTED]  
22 [REDACTED]  
23 [REDACTED]

24 [REDACTED] The assets never changed location; Zada and Poblete  
25 continued to use them for the Perfect 10 business. SUF284.

26 The assets that Zada supposedly "bought" for \$70,000 included a Lexus  
27 automobile, furniture, 4000 back issues of the Perfect 10 magazine, computers,  
28 office equipment, and furniture. SUF246. The value of the magazines standing

1 alone was between \$46,000 and \$120,000. SUF303. The Lexus was worth around  
2 \$30,000.<sup>4</sup> SUF304. Perfect 10's tax returns show that the original value of its  
3 office furniture and equipment was \$555,464, and their value at the time of transfer  
4 was approximately \$55,000.<sup>5</sup> SUF247.

5 On March 26 and 27, 2015, while the sanctions motion was pending (which  
6 unlike a fee award could have required payment by Perfect 10's lawyers), Zada also  
7 contributed an additional \$454,002.05 to Perfect 10, which exact amount, not  
8 coincidentally, it then paid over to its lawyers for the potential sanctions award  
9 against them personally. SUF238-39, 241. The district court later decided that  
10 sanctions were moot in light of the attorney's fees award. SUF248. The day after  
11 that decision, the lawyers [REDACTED], shortly  
12 after that, Zada quickly took \$454,002.05 out of Perfect 10's account to avoid  
13 attachment. SUF249-51.

14 On March 30, 2015, Zada [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED] imminent, he then also offered to settle the underlying  
19 case on April 4, 2015 for \$2 million in cash plus a \$3.819 million deed of trust on  
20 the mansion. SUF216. Zada represented to the Court that he did not have  
21 sufficient cash to pay the judgment. SUF217. But on April 21, 2015, he closed [REDACTED]

22 <sup>4</sup> The evidence also shows that Mr. Zada did not pay genuine attention to the assets  
23 he was purchasing or their actual value: Perfect 10 now contends that a Lexus  
24 belonged to Mr. Zada all along, and that he mistakenly paid Perfect 10 for it; this  
25 admission only adds to the inference that the transfer was an actual fraud. SUF6. It  
demonstrates that Mr. Zada only cared that he became the nominal owner so he  
could protect the assets from the judgment.

26 <sup>5</sup> Zada has recently tried to claim that Perfect 10 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

1 [REDACTED]  
 2 That same week, Melanie [REDACTED]  
 3 [REDACTED]  
 4 [REDACTED]

5 She also contacted Perfect 10's accountant to  
 6 discuss "how we pay things" in light of the "\$5M judgment" against Perfect 10.  
 7 SUF212. Ultimately, Zada directed that any money coming into Perfect 10 should  
 8 be "given over" to him, on the basis that he would hold it and pay Perfect 10's  
 9 expenses personally. SUF213.

### 10 **III. LEGAL STANDARDS**

11 To obtain summary judgment, Perfect 10 and Norman Zada must establish  
 12 that the undisputed facts compel a judgment in their favor and that no reasonable  
 13 jury could find for Giganews and Livewire. Fed. R. Civ. P. 56(a); *Anderson v.*  
 14 *Liberty Lobby, Inc.*, 477 U.S. 242, 256–57 (1986). A party is entitled to summary  
 15 judgment if the movant shows that there is no genuine dispute as to any material  
 16 fact. *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1049 (9th Cir. 2014).  
 17 The "inferences to be drawn from the underlying facts . . . must be viewed in the  
 18 light most favorable to the party opposing the motion." *United States v. Diebold,*  
 19 *Inc.*, 369 U.S. 654, 655 (1962). If reasonable minds could differ on the inferences  
 20 to be drawn from the facts, a court should deny summary judgment. *Lake*  
 21 *Nacimiento Ranch Co. v. San Luis Obispo Cnty.*, 841 F.2d 872, 875 (9th Cir.  
 22 1987).<sup>6</sup>  
 23  
 24  
 25  
 26

27  
 28 <sup>6</sup> Defendants rely on declarations of "character witnesses" and other inadmissible  
 evidence to prove Zada's intent, as Giganews's objections describe. The Court  
 cannot consider this evidence on summary judgment. Fed. R. Civ. P. 56(c)(2).

#### IV. ARGUMENT

##### A. The Court should deny summary judgment as to Plaintiffs' claims for actual fraudulent transfer, as ample evidence would allow a reasonable jury to conclude that Zada and Perfect 10 transferred cash and assets to hinder, delay, or defraud creditors.

California Civil Code allows a plaintiff to establish a fraudulent transfer under two distinct theories: actual fraud and constructive fraud. *See* Cal. Civ. Code §§ 3439.04(a)(1) and (2), 3439.05. A transfer is fraudulent under an actual fraud theory “whether the creditor’s claim arose before or after the transfer was made or the obligation was incurred” if it was made “[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor.” Cal. Civ. Code § 3439.04(a)(1); *Donell v. Kowell*, 533 F.3d 762, 770 (9th Cir. 2008); *see also Opperman v. Path*, 87 F. Supp. 3d 1018, 1066 (N.D. Cal. 2014); *Kirkeby v. Super. Ct.*, 33 Cal. 4th 642, 648 (2004). Here, Defendants moved for summary judgment on the element of intent and, as to specific transfers, on the element of harm to Plaintiffs. None of Defendants’ arguments warrants judgment in their favor.

##### 1. Granting summary judgment as to a fraudulent transfer defendant’s mental state is typically reversible error.

Whether a transfer was made with fraudulent intent is a question of fact, and “[t]he issue of fraudulent intent is one for the trier of fact.” *Locke v. Warner Bros., Inc.*, 57 Cal. App. 4th 354, 368 (1997); *see also Tatung Co. v. Hsu*, 217 F. Supp. 3d 1138, 1187 (C.D. Cal. 2016) (quoting *Filip v. Bucurenciu*, 129 Cal. App. 4th 825, 834 (2005)). Deciding intent requires credibility determinations, the weighing of the evidence and the drawing of legitimate inferences from the facts, which are jury functions, not those of a judge on summary judgment. *Heller Ehrman LLP v. Jones Day (In re Heller Ehrman LLP)*, No. 08-32514DM, 2013 WL 951706, \*6 (Bankr. N.D. Cal. Mar. 11, 2013). For that reason, the Ninth Circuit has repeatedly stated that summary judgment on intent is inappropriate:



1 Cases where intent is a primary issue generally are inappropriate for  
 2 summary judgment. Fraud claims, in particular, normally are so  
 3 attended by factual issues (including those related to intent) that  
 4 summary judgment is seldom possible.

5 *Plise v. Krohn (In re Plise)*, 719 F. App'x 622, 624 (9th Cir. 2018) (quoting  
 6 *Provenz v. Miller*, 102 F.3d 1478, 1489 (9th Cir. 1996)) (second citation omitted);  
 7 *see also In re Tenorio*, 2018 WL 989691, at \*12 (B.A.P. 9th Cir. Feb 8, 2018)  
 8 (“Normally, it is error to grant summary judgment on an issue of intent.”).

9 Summary judgment is only appropriate where “one party’s version of events is so  
 10 utterly discredited by the record that no reasonable jury could have believed him.”  
 11 *In re Plise*, 719 F. App'x at 624 (citation omitted). As discussed below, the record  
 12 discredits only Zada’s version of events. The Court should deny the motion.

13 **2. Plaintiffs have substantial evidence that Defendants made the**  
 14 **transfers with intent to hinder, delay, or defraud creditors.**

15 Substantial evidence of Mr. Zada’s fraudulent intent precludes summary  
 16 judgment in favor of Perfect 10. Plaintiffs can meet their burden by showing an  
 17 intent to hinder “any creditor,” i.e., *either* a specific intent to hinder their own  
 18 collection, *or* an intent to hinder another creditor or *creditors generally*. Cal. Civ.  
 19 Code § 3439.04(a)(1). First, there is direct evidence of fraud: Zada made a transfer  
 20 of \$850,000 to himself only six days after the court granted summary judgment  
 21 against Perfect 10. He testified that those orders are what prompted him to move  
 22 this money. SUF206. Zada also admitted he transferred Perfect 10’s physical  
 23 assets to himself after the fee award in order to “save” the Perfect 10 business by  
 24 shielding the assets from the “disruption” of judgment. SUF261 (“it would have  
 25 been totally disruptive to have those [assets] seized”); *see also* Dkt. 73 (Zada MSJ  
 26 Decl.) at 2–3. These are direct admissions that he made transfers to hinder  
 27 Giganews’s ability to enforce its judgment against Perfect 10’s assets.

28 Direct evidence like this is rarely available; fraudulent intent is typically

1 established purely by inference from circumstances. *See Wolkowitz v. Beverly (In*  
 2 *re Beverly)*, 374 B.R. 221, 235 (B.A.P. 9th Cir. 2007), *aff'd in part, dismissed in*  
 3 *part*, 551 F.3d 1092 (9th Cir. 2008). Here Plaintiffs have also uncovered further, if  
 4 indirect, evidence of Zada's and Perfect 10's fraudulent intent, which, together with  
 5 the admissions, enable the jury to conclude that all transfers were fraudulent.

6 Zada began moving Perfect 10 assets in early 2014. The transfers largely  
 7 coincided with unfavorable rulings in the case against Giganews. The largest,  
 8 admittedly fraudulent, transfer of \$850,000 came just six days after the summary  
 9 judgment order ended Perfect 10's case. *See* SUF205. Zada's and his housemate's  
 10 behavior after the order confirms the fraud. [REDACTED]

11 [REDACTED]  
 12 [REDACTED]  
 13 [REDACTED]  
 14 [REDACTED]  
 15 [REDACTED]. SUF227. In other words, he immediately sought to cover  
 16 up *all* his 2014 transfers. Zada also transferred \$454,002.05 of Perfect 10's cash to  
 17 himself with the fee award outstanding. And together with his paralegal and  
 18 accountant, Zada decided that Perfect 10's money should be "given over" to him to  
 19 pay expenses because of the judgment. SUF213. Perfect 10 has not voluntarily  
 20 paid any part of the judgment. SUF226.

21 Zada has claimed that he took Perfect 10's cash because he was "entitled" to  
 22 it as an investor. But his transfers did not in any sense "repay" Zada, since he  
 23 continued to pay Perfect 10 expenses from his accounts. As further evidence of  
 24 fraud, Perfect 10 also continued to use the "transferred" physical property for its  
 25 business [REDACTED]. SUF245. [REDACTED]

26 [REDACTED]  
 27 [REDACTED]  
 28 A reasonable juror has an ample basis to conclude that Zada acted with the

1 actual intent to hinder, delay or defraud with respect to all the transfers. Given the  
2 extensive evidence, including a cover-up attempt reaching back to the January 2014  
3 transfer and an actual request for sanctions as of August 2014, it would be error for  
4 the Court to rule as a matter of law that Zada lacked the requisite intent before the  
5 November summary judgment order.

6 **3. The “badges of fraud” analysis does not control on summary**  
7 **judgment, but the presence of badges here indicates that the**  
8 **jury will find the transfers were fraudulent.**

9 The Uniform Fraudulent Transfer Act (“UFTA”) lists eleven factors, called  
10 “badges of fraud,” as evidencing wrongful intent. Legis. Comm. Comments, 12A  
11 West’s Ann. Civ. Code (1997 ed.) foll. § 3439.04; Cal. Civ. Code § 3439.04(b). No  
12 minimum number of factors is necessary to support a finding of fraudulent intent.  
13 *Filip*, 129 Cal. App. 4th at 834. Instead, “the trier of fact should consider all of the  
14 relevant circumstances surrounding the transfer.” *In re Ezra*, 537 B.R. 924, 931  
15 (B.A.P. 9th Cir. 2015). “A trier of fact is entitled to find actual intent based on the  
16 evidence in the case, even if no ‘badges of fraud’ are present. Conversely, specific  
17 evidence may negate an inference of fraud notwithstanding the presence of a  
18 number of ‘badges of fraud.’” *In re Beverly*, 374 B.R. at 236.

19 Given both Zada’s direct admissions and the circumstantial evidence, a  
20 reasonable jury could find fraudulent intent without any of the “badges.” But  
21 Plaintiffs have evidence of many of them:

- 22 • *Perfect 10 made the transfers to an insider.* The relevant test for an  
23 “insider” focuses “on the closeness of the parties and the degree to which the  
24 transferee is able to exert control or influence over the debtor.” *Browning*  
25 *Interests v. Allison (In re Holloway)*, 955 F.2d 1008, 1011 (5th Cir. 1992)  
26 (relying on Ninth Circuit authorities). Zada was the president and sole  
27 shareholder of Perfect 10, and he had complete control of its assets and  
28 operations. SUF175.

- 1 • *Perfect 10 retained possession or control of the property transferred after the*  
2 *transfer. Zada paid Perfect 10 expenses personally after the transfers.*  
3 *SUF282, 292. Perfect 10’s assets also remained in the same location, and*  
4 *Zada and Poblete continued to use them for the Perfect 10 business.*  
5 *SUF284.*
- 6 • *Zada removed and concealed assets, and he continues to do so. Zada*  
7 *removed Perfect 10’s physical assets; and, although the Court ordered him to*  
8 *identify the transferred assets, he has still not provided a complete*  
9 *identification. SUF285.*
- 10 • *Perfect 10 did not receive reasonably equivalent consideration. Equivalent*  
11 *value for a transfer exists where “property is transferred or an antecedent*  
12 *debt is secured or satisfied.” Cal. Civ. Code § 3439.03. Zada testified he*  
13 *made the 2014 cash transfers to reduce Perfect 10’s bank balance and*  
14 *because of the “summary judgment orders,” and the 2015 transfer because*  
15 *Perfect 10’s attorney was no longer threatened with sanctions. In other*  
16 *words, Perfect 10 did not receive consideration in return. As discussed*  
17 *below, Perfect 10 also did not receive equivalent value for its assets.*
- 18 • *Perfect 10 had pending litigation that carried with it risks of multiple*  
19 *judgments. The fact finder must also consider “[w]hether before the transfer*  
20 *was made or obligation was incurred, the debtor had been sued or threatened*  
21 *with suit.” Cal. Civ. Code § 3439.04(b)(4). During the transfers, Perfect 10*  
22 *had four pending copyright suits against eleven defendants. In three of those*  
23 *cases, defendants expressly sought an award of their attorney’s fees under the*  
24 *Copyright Act. SUF183, 190. In the fourth, which Perfect 10 dismissed on*  
25 *April 2, 2015, shortly after this Court’s fee award, the defendant had not yet*  
26 *filed an answer. SUF301.*
- 27 • *The transfers occurred shortly before a substantial debt was incurred.*  
28 *“[T]hese transfers all occurred shortly before a substantial debt was incurred.*

1 By drawing all logical inferences in favor of Plaintiff,” the Court should hold  
2 that “Plaintiff has produced sufficient evidence . . . to raise a disputed fact as  
3 to intent to hinder delay and defraud . . . .” *In re Empire Land, LLC*, 2016  
4 WL 1371278, at \*6 (Bankr. C.D. Cal. Apr. 4, 2016).

- 5 • *The transfers represented substantially all of Perfect 10’s assets.* Zada had  
6 emptied the Perfect 10 bank account by the time of the fee award. By April  
7 2015, Perfect 10 had a balance of \$27,000, as well as IP assets for which the  
8 receiver has found only two willing purchasers: Zada, for \$300,000, and  
9 Giganews whose \$500,000 bid was not in case, but rather a credit based on  
10 payments into the receivership and a reduction of the judgment. SUF294-96.  
11 SUF305 (balances for October 2014 (\$1.28 million in cash) and April 2015  
12 (\$27,000)).
- 13 • *Perfect 10 became insolvent as a result of the transfers.* A transfer leaves a  
14 debtor with assets that are unreasonably small in relation to the debtor’s  
15 business under the UFTA if the assets are not reasonably likely to meet the  
16 debtor’s needs. *See Intervest Mortg. Inv. Co. v. Skidmore*, 655 F. Supp. 2d  
17 1100, 1105–06 (E.D. Cal. 2009). After the transfers,<sup>7</sup> Perfect 10 was unable  
18 to meet its foreseeable expenses, which Zada instead paid directly. SUF292  
19 (“So I provided Perfect 10 with the money as I had been doing for years.”).

20 Defendants cite two authorities for the proposition that evidence of several  
21 badges of fraud may be insufficient to preclude summary judgment. Mot. at 8. But  
22 neither bears on the facts of this case. In *Wyzard v. Goller*, 23 Cal. App. 4th 1183  
23 (1993), a client gave his attorney a promissory note secured by other assets to cover  
24

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25 <sup>7</sup> For this analysis, courts assess the *cumulative effect* of the pattern or series of  
26 transactions on the debtor’s solvency. *See Soza v. Hill (In re Soza)*, 542 F.3d 1060,  
27 1067 (5th Cir. 2008); *Vill. of San Jose v. McWilliams*, 284 F.3d 785, 791 (7th Cir.  
28 2002); *In re Leneve*, 341 B.R. 53, 61 (Bankr. S.D. Fla. 2006); *In re Cansorb Indus.*  
*Corp.*, No. 07-50041, 2009 WL 4062220, at \*8 (Bankr. M.D.N.C. Nov. 20, 2009);  
*In re Dawley*, No. 01-32215DWS, 2005 WL 2077074, at \*11 (Bankr. E.D. Pa. Aug.  
10, 2005). This makes sense, as otherwise debtors could avoid liability for all but  
the very last in a string of related fraudulent transfers.

1 anticipated services. In *Annod Corp. v. Hamilton & Samuels*, 100 Cal. App. 4th  
 2 1286 (2002), a law firm allowed its partners to draw their salaries while the firm  
 3 owed a rent payment. In both cases, the transferees provided equivalent value in  
 4 services under the terms of a written agreement. In *Annod*, the record also  
 5 contained “overwhelming” evidence that the partners were not “looting” the firm.  
 6 *Id.* at 1296. This case is exactly the opposite. Perfect 10 did not make the transfers  
 7 in repayment of an antecedent debt memorialized in a writing. Although Zada  
 8 created fraudulent documents after the fact to make it *appear* that way, he testified  
 9 that the transfers were for other reasons, including to reduce Perfect 10’s balance  
 10 and because of the “summary judgment orders,” not in payment of a debt.

11 **4. None of Defendants’ arguments or evidence establishes an**  
 12 **honest intent as a matter of law.**

13 Defendants argue that for various reasons a jury cannot find fraudulent intent.  
 14 These arguments ignore the reality.

15 **a. Receipt of payment for the physical assets does not**  
 16 **preclude an “actual fraud” theory.**

17 Defendants argue that Zada’s nominal payment for the physical assets  
 18 precludes his liability under any theory. Mot. at 10. As Plaintiffs discussed above,  
 19 a question of fact exists as to whether Perfect 10 truly received *any* payment for the  
 20 assets, given that Perfect 10 recorded and reported the \$70,000 payment to the IRS  
 21 as an equity contribution. More important, any value that Perfect 10 received for  
 22 the assets, while relevant to *constructive* fraud, is wholly irrelevant to the *actual*  
 23 fraud claim. An actual fraud theory is “independent” of constructive fraud “and  
 24 does not require proof of anything more than actual intent to defraud.” *Lyons v.*  
 25 *Sec. Pac. Nat. Bank*, 40 Cal. App. 4th 1001, 1020 (1995), *as modified on denial of*  
 26 *reh’g* (Nov. 30, 1995); *In re Singh*, No. AP 12-02370, 2015 WL 1887939, at \*17  
 27 (Bankr. E.D. Cal. Apr. 22, 2015) (finding of “reasonably equivalent value” did not  
 28 affect liability for actual fraudulent transfer); *see also In re Indep. Clearing House*



1 Co., 77 B.R. 843, 859 (D. Utah 1987) (“A transfer made for reasonably equivalent  
2 value can still be fraudulent and hence avoidable if it was made ‘with actual intent  
3 to hinder, delay, or defraud’ . . .”).

4 **b. The Ninth Circuit’s rejection of an alter ego judgment**  
5 **against Zada does not collaterally estop any portion of**  
6 **the fraud claims.**

7 Defendants have twice argued that a statement in the Ninth Circuit opinion  
8 affirming the district court’s ruling on *alter ego* collaterally estops Giganews from  
9 asserting a fraudulent transfer claim. They argue that, when the Ninth Circuit  
10 affirmed this Court’s decision not to add Zada to the judgment against Perfect 10 as  
11 alter ego, it necessarily blessed Zada’s withdrawals from Perfect 10’s bank account  
12 as not fraudulent. The Court already rejected this argument as to both theories of  
13 fraud, and it should not reconsider that correct ruling.

14 A party asserting collateral estoppel must demonstrate: “(1) the issue at stake  
15 was identical in both proceedings; (2) the issue was actually litigated and decided in  
16 the prior proceedings; (3) there was a full and fair opportunity to litigate the issue;  
17 and (4) the issue was necessary to decide the merits.” *Oyeniran v. Holder*, 672 F.3d  
18 800, 806 (9th Cir. 2012). Even where grounds for its application exist, a court  
19 should not apply the doctrine when considerations of policy or fairness outweigh  
20 the doctrine’s purposes. *Vandenberg v. Super. Ct.*, 21 Cal. 4th 815, 829 (1999).

21 The doctrine of collateral estoppel does not preclude litigation of an issue  
22 unless it is identical to the one in the former proceeding. *See Bostick v. Flex Equip.*  
23 *Co.*, 147 Cal. App. 4th 80, 96–97 (2007);<sup>8</sup> *see also Sutton v. Golden Gate Bridge,*  
24 *Highway & Transp. Dist.*, 68 Cal. App. 4th 1149, 1155 (1998). The doctrine  
25 requires “strict identity,” in other words the issues must be “precisely identical.”  
26 *See United Educators of S.F. AFT/CFT v. Cal. Unemployment Ins. Appeals Bd.*,

27 \_\_\_\_\_  
28 <sup>8</sup> A federal district court sitting in diversity must apply the collateral estoppel rules  
of the forum state. *See Pardo v. Olson & Sons, Inc.*, 40 F.3d 1063, 1066 (9th Cir.  
1994).



1 247 Cal. App. 4th 1235, 1245–46 (2016).

2 The Ninth Circuit affirmed the ruling that Giganews had not shown it would  
3 be manifestly unfair to require it to collect the judgment from Perfect 10 alone,  
4 based on a determination that neither bad faith nor stripping of assets had rendered  
5 Perfect 10 “so undercapitalized” that it could not meet its expected debts. *Perfect*  
6 *10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 678 (9th. Cir. 2017), *cert. denied*, 138 S.  
7 Ct. 504 (2017). It did not consider the issue of whether Zada made withdrawals  
8 from Perfect 10’s bank account to keep money away from creditors. Those issues  
9 are logically and legally distinct: the “alter ego” issue did not specifically challenge  
10 the three transfers that incidentally appeared in the record.<sup>9</sup> Defendants argue that  
11 “bad faith” and “fraudulent intent” are related mental states. Mot. at 13. But  
12 whether Zada engaged in bad faith by using Perfect 10 to shield *himself* from  
13 personal liability is a separate issue from whether Zada shielded *Perfect 10* from  
14 attachment of its assets through fraudulent transfers. They are not “identical” issues  
15 giving rise to preclusion.

16 Second, collateral estoppel does not apply where a party had no full and fair  
17 opportunity to litigate the issue in the earlier proceeding. *Kerner v. Super. Ct.*, 206  
18 Cal. App. 4th 84, 125 (2012); *see also Bostick*, 147 Cal. App. 4th at 97. Plaintiffs  
19 had no ability to litigate the issue of fraudulent transfers in the copyright case. The  
20 Court entered final judgment in November 2014. Zada revealed the fraud at his  
21 January 2016 debtor’s examination, where he confessed that “the summary  
22 judgment orders” caused him to take money from Perfect 10’s bank account.

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23  
24 <sup>9</sup> This Court has already ruled that the bulk of the transfers, including the \$850,000  
25 that Zada took immediately after losing summary judgment, were not before the  
26 Court in the related case. (Dkt. 25 at 7.). The Court’s ruling that Perfect 10 was  
27 not *undercapitalized* in “bad faith” as of March 2014 did not consider the new facts  
28 that Zada later took out over a million more dollars and took ownership of Perfect  
10’s physical assets, as well as the extensive other evidence of fraud that has  
emerged.

1 Plaintiffs had no ability to assert claims for fraudulent transfer in the original case.  
 2 Defendants have improperly invoked collateral estoppel in an attempt to bar the  
 3 litigation of issues which the earlier case never determined. Plaintiffs are entitled to  
 4 a fair proceeding to present their new case fully.

5 Defendants also misuse the Ninth Circuit's alter ego holding in their  
 6 argument for a "good faith" defense.<sup>10</sup> Mot. at 23. Defendants have the burden of  
 7 proof on that defense. *See In re Beverly*, 374 B.R. at 239. In a case involving a  
 8 debtor with actual fraudulent intent, the defense applies only to good faith  
 9 transferees who made transfers for value. Cal. Civ. Code § 3439.08(a). But Zada,  
 10 as a transferee, lacks good faith under the statute if he either "(1) colludes with the  
 11 debtor or otherwise actively participates in the debtor's fraudulent scheme, or (2)  
 12 has actual knowledge of facts that would suggest to a reasonable person that the  
 13 transfer was fraudulent." *In re First Alliance Mortg. Co.*, 298 B.R. 652, 665 (C.D.  
 14 Cal. 2003) (quoting *CyberMedia, Inc. v. Symantec Corp.*, 119 F. Supp. 2d 1070,  
 15 1075 (N.D. Cal. 1998)); *see also Nautilus, Inc. v. Yang*, 11 Cal. App. 5th 33, 46 (Ct.  
 16 App. 2017), *reh'g denied* (May 8, 2017), *review denied* (Aug. 9, 2017) ("actual  
 17 knowledge of the transferor's fraudulent intent" precludes transferee from raising  
 18 good faith defense); *accord In re Beverly*, 374 B.R. at 239. There is a genuine  
 19 dispute regarding many, if not all, facts Defendants claim to support "good faith" *as*  
 20 *to the transfers*. Summary judgment is therefore inappropriate.

21 **c. Defendants' illusory offer to settle demonstrates**  
 22 **bad faith, not good faith.**

23 Defendants repeat their twice-failed argument that Zada's conditional offer to  
 24 settle the litigation for \$2 million and a deed of trust, with many strings attached, is

25  
 26 <sup>10</sup> None of Defendants' authorities apply here, where significant questions of  
 27 material fact exist. *See* Mot. at 13. *Benny* involves the appeal of a jury instruction  
 28 for a conviction for RICO violations; *In re Leavitt* and *In re @Vantage.com* discuss  
 whether bad faith is a cause for dismissal under the Bankruptcy Code; and "there  
 was no serious claim of factual dispute" that transferees "paid reasonably  
 equivalent value" in *Lewis*.

1 such strong evidence of Zada’s good-faith desire to pay the judgment that it  
 2 precludes the jury from finding to the contrary as a matter of law. *After* he had  
 3 already taken steps to insulate Perfect 10’s cash and assets, Zada proposed a  
 4 “settlement” that included negotiating terms of a *conditional* first deed of trust over  
 5 his residence. But this was a sham. Zada could resist enforcement later, forcing  
 6 Giganews into new litigation over its right to foreclose. Zada could never have  
 7 imposed these conditions without first shielding Perfect 10’s assets through the  
 8 fraudulent transfers. Without the transfers, those assets would have remained with  
 9 Perfect 10 and Giganews would have simply enforced its judgment against them.  
 10 This is clear evidence of Zada’s fraud, not his good faith, and on a motion for  
 11 summary judgment the Court must interpret the evidence in the light most favorable  
 12 to Giganews.

13 **5. Plaintiffs have evidence of harm sufficient to preclude**  
 14 **summary judgment.**

15 Plaintiffs can easily establish the element of harm, entitling them to void  
 16 completely all of the transfers. “Under the UFTA, a creditor, [...] who has a right  
 17 to payment, suffers an injury in fact when a debtor fraudulently transfers property  
 18 as defined by the UFTA.” *Nikko Materials USA, Inc. v. Navcom Def. Elecs., Inc.*,  
 19 No. CV 05-4158-JFW (VBKx), 2014 WL 12700714, at \*4 (C.D. Cal. Jan. 22,  
 20 2014). A creditor-plaintiff shows harm by demonstrating that the transfer put  
 21 “beyond reach” money or property that otherwise would be subject to payment of  
 22 the debt. *Mehrtash v. Mehrdash*, 93 Cal. App. 4th 75, 80 (2001). Once the plaintiff  
 23 establishes a transfer is fraudulent, he or she is entitled to “*avoidance of the transfer*  
 24 *or obligation to the extent necessary to satisfy the creditor’s claim.*” Cal. Civ.  
 25 Code. § 3439.07.

26 Plaintiffs have met this standard. Perfect 10 made each of the fraudulent  
 27 transfers to Zada, who was personally “beyond reach” of the judgment when the  
 28 Court denied the alter ego judgment. Plaintiffs are entitled to void each of the

1 transfers. What Zada did later with the money, and whether he ultimately used it to  
2 pay other Perfect 10 expenses, does not matter. Defendants' claims that Plaintiffs  
3 were not harmed because they did not accept an oppressive settlement offer, or did  
4 not move quickly enough to attach amounts that Zada filtered back through the  
5 Perfect 10 bank account for fleeting amounts of time, are similarly irrelevant.  
6 Zada's removal of the funds and assets demonstrates the "harm" element required  
7 by UFTA.

8 Nor is there any legal or logical support for the notion that Zada's so-called  
9 "putback" of funds or his personal payments to other Perfect 10 creditors has any  
10 bearing on the amount of his liability for fraudulent transfers. Perfect 10 offers no  
11 authority that would allow it to "net" out these amounts from Giganews's recovery.  
12 The "general rule permitting a debtor to prefer one creditor or group of creditors  
13 over others has long been subject to exceptions in cases of fraud." *Wyzard*, 23 Cal.  
14 App. 4th at 1187.

15 The only relevant "netting" rule is from the statutory "good faith" defense  
16 that permits innocent individuals implicated in a constructive fraudulent transfer  
17 (for instance, good faith investors in a Ponzi scheme) to limit their damages.  
18 *Donell*, 533 F.3d at 771–72 (explaining relationship between Cal. Civ. Code  
19 § 3439.08(a) and so-called "netting rule"). Such an approach has no place in cases  
20 of an actual fraudulent transfer. In cases of actual fraudulent transfers, a plaintiff  
21 may "recover the entire amount" of the offending transfer, "including amounts  
22 which could be considered 'return of principal.'" *Id.* at 771. Giganews is trying to  
23 void payments from Zada's accounts to Zada, not to innocent third parties. Given  
24 the substantial evidence of Zada's fraudulent intent, the statute provides no basis for  
25 the Court to rule that any transfers are not voidable. Nor is there any other basis for  
26 limiting Giganews's recovery on summary judgment.

**B. The Court should deny summary judgment as to Plaintiffs’ alternative claims for constructive fraudulent transfer and grant summary judgment for Plaintiffs as non-moving parties.**

“Constructive” fraud is distinct from “actual” fraud and gives rise to a separate legal claim. *See Reddy v. Gonzalez*, 8 Cal. App. 4th 118, 122–123 (1992). Intent is irrelevant to constructive fraud. *See* Cal. Civ. Code §§ 3439.04(a)(2), 3439.05. “A transfer is constructively fraudulent if the debtor made the transfer without receiving ‘reasonably equivalent value’ in exchange and the debtor either: (1) was engaged or about to engage in a business or transaction for which the debtor’s remaining assets were unreasonably small in relation to the business or transaction; *or* (2) intended to incur or believed (or reasonably should have believed) that it would incur debts beyond its ability to repay; *or* (3) was insolvent at the time, or was rendered insolvent by the transfer or obligation.” *United States v. Whitman*, No. 2:12-CV-2316-MCE-EFB, 2013 WL 3968083, at \*7 (E.D. Cal. July 31, 2013), *report and recommendation adopted*, No. 2:12-CV-2316-MCE-EFB, 2013 WL 4516009 (E.D. Cal. Aug. 26, 2013) (emphases added); *accord Choice Hotels Int’l, Inc. v. Wright*, No. CV 03-3785-RGK (JTLx), 2005 WL 8156289, at \*3 (C.D. Cal. Mar. 24, 2005). Here, the evidence would justify summary judgment in favor of *Plaintiffs* as non-moving parties. *See* Fed. R. Civ. P. 56(f). At the very least a material question of fact exists as to all elements.

**1. A reasonable jury will conclude that Perfect 10 did not receive reasonably equivalent value for the transfers.**

“Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied . . . .” Cal Civ Code § 3439.03. The evidence shows that Perfect 10 did not receive reasonably equivalent value for the transfers.

- Perfect 10 received nothing of value in exchange for its cash: Zada just put its money into his own accounts. SUF277. This Court itself concluded that

1 Zada’s testimony about the reasons for the 2014 transfers is inconsistent with  
 2 the idea that Perfect 10 received value for them. SUF278. The reason for the  
 3 2015 transfer from Perfect 10 to Zada—that imposition of monetary  
 4 sanctions never occurred—is similar.

- 5 • Perfect 10 received for its assets either nothing of value or a nominal  
 6 payment of \$70,000 that was far less than their fair value. (See pg 6-7.)

7 Perfect 10 classified the \$70,000 “payment” [REDACTED]  
 8 [REDACTED]. SUF2.

9 Defendants offer several conflicting reasons why the Court should infer that  
 10 Perfect 10 received equivalent value for its 2014 cash transfers. See Mot. at  
 11 15. None of the reasons is legally sufficient to raise a triable issue of fact, let alone  
 12 warrant summary judgment in favor of Defendants. First, Defendants argue the  
 13 transfers “paid” Zada for his 18 years of work for Perfect 10. But without some  
 14 written instrument establishing an existing obligation, the requirement that the  
 15 debtor “receive value” requires a contemporaneous exchange. See Cal. Civ. Code  
 16 § 3439.03; *In re Brobeck, Phleger & Harrison LLP*, 408 B.R. 318, 342, 347  
 17 (Bankr. N.D. Cal. 2009) (quoting *Jackson v. Mishkin (In re Adler, Coleman*  
 18 *Clearing Corp.)*, 263 B.R. 406, 466–67 (S.D.N.Y. 2001)) (construing “essentially  
 19 the same” constructive fraudulent transfer provision in Bankruptcy Code). There is  
 20 no record evidence that the transfers were a delayed salary payment. Again, the  
 21 Court has already correctly observed that Zada’s own sworn testimony contradicts  
 22 that explanation. SUF278.

23 Next, Defendants argue the transfers returned Zada’s capital investment in  
 24 Perfect 10, and the “value” it received was a corresponding write-down on its  
 25 books. But “[b]ecause the policy behind fraudulent conveyance law is to preserve  
 26 assets of the estate, reasonably equivalent value is determined from the standpoint  
 27 of the estate’s creditors, it is not determined from the defendant’s perspective.” *In*  
 28 *re 3dfx Interactive, Inc.*, 389 B.R. 842, 863 (Bankr. N.D. Cal. 2008), *aff’d*, 585 F.



1 App'x 626 (9th Cir. 2014); *accord Kirkland v. Riso*, 98 Cal. App. 3d 971, 977  
2 (1979). A reduction in *equity* in the accounting records is not an asset that has *any*  
3 value to creditors.

4 Finally, Defendants argue that the transfers repaid a debt. But the undisputed  
5 evidence, including *years* of Perfect 10 accounting records and tax filings, shows  
6 that Zada held an equity investment in Perfect 10, not debt. Defendants failed to  
7 present as evidence the falsified “repayment” notes Zada and Poblete created  
8 around the time of the fee award, tacitly acknowledging they are fraudulent. The  
9 only evidence of a “debt” is Zada’s own self-serving and uncorroborated  
10 declaration, which the Court must disregard. *See In re EPD Inv. Co.*, No. 2:10-BK-  
11 62208-ER, 2018 WL 947636, at \*8 (Bankr. C.D. Cal. Feb. 17, 2018) (disregarding  
12 declaration asserting that declarant lent debtor over \$2 million, where declarant  
13 failed to provide documentary evidence substantiating the alleged loans).

14 As to the physical assets, Defendants claim they were “worth at most  
15 \$11,900.” Mot. at 2–3. But according to Perfect 10’s records, it received *nothing*  
16 for them. Instead, [REDACTED].  
17 But even if treated as a bona fide purchase, the value of the assets exceeded  
18 \$70,000: the car and magazines alone exceed that amount, the furniture and  
19 computing equipment had substantial additional value, and there are other valuable  
20 assets that Zada transferred but did not disclose. *Cf. Attebury Grain LLC v. Grayn*  
21 *Co.*, 721 F. App'x 669, 671–72 (9th Cir. 2018) (“any reasonable juror would have  
22 to find [...] payment of \$140,000 was not reasonably equivalent value for the  
23 \$306,900 worth of assets plus an unspecified value of corn inventory”).

24 **2. A reasonable jury will conclude the transfers left Perfect 10**  
25 **with insufficient assets to carry on its business.**

26 The evidence also establishes the second element of constructive fraud,  
27 regardless of which prong is applied. “[A] transfer leaves a debtor with assets that  
28 are ‘unreasonably small in relation to [the debtor’s] business or transaction’ if the



1 assets are not reasonably likely to meet the debtors' present and future needs."  
 2 *Intervest Mortg. Inv. Co. v. Skidmore*, 655 F. Supp. 2d at 1106; *see also In re*  
 3 *AWTR Liquidation Inc.*, 548 B.R. 300, 312–13 & n.2 (Bankr. C.D. Cal. 2016) (lack  
 4 of capital would lead to an inability to generate enough cash flow to sustain  
 5 operations).

6 Here, the transfers indisputably left Perfect 10 with insufficient ability to  
 7 carry on its existing business or pay its foreseeable expenses.<sup>11</sup> First, the 2015 asset  
 8 transfer and transfer of \$454,000 both occurred after the Court had entered a \$5.6  
 9 million judgment against Perfect 10. Second, the transfers left Perfect 10 with  
 10 insufficient assets to carry on its existing business *regardless* of whether that  
 11 judgment was ever entered. After the transfers, Perfect 10 had to lay off its  
 12 employees, including its paralegal and bookkeeper Melanie Poblete (who continued  
 13 to be Zada's close personal assistant and housemate), stop work by its accountant,  
 14 definitively [REDACTED], and dismiss other pending  
 15 litigation. SUF281. It also could not pay its legal fees in the *Giganews* case: Zada  
 16 paid these personally out of his own accounts. SUF282.

17 Given all these facts, *Giganews* does not have to show that the fee award was  
 18 a foreseeable expense to overcome summary judgment. Nevertheless, the evidence  
 19 establishes that Perfect 10 reasonably should have anticipated the expense of a fee  
 20 award. Reasonable foreseeability is an objective, not subjective, test. *In re Heller*  
 21 *Ehrman*, 2013 WL 951706, at \*10. Perfect 10 had four pending U.S. cases in 2014,

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22 <sup>11</sup> A debtor cannot insulate itself from a constructive fraud claim by making many  
 23 smaller fraudulent transfers and arguing only the last rendered it unable to carry on  
 24 its business. The Court must analyze the effect of the transfers together. *See* fn 7;  
 25 *In re Martirosian*, No. 1:15-BK-11139-MB, 2017 WL 1041107, at \*3 (Bankr. C.D.  
 26 Cal. Mar. 14, 2017) (on a motion for preliminary injunction, analyzing "a series of  
 27 transfers and transactions" used in a "scheme" that allowed debtor and his wife to  
 28 shelter real property from creditors); *Davidson v. Barnhardt*, No. CV 11-7298 FMO  
 (VBKx), 2013 WL 6388354, at \*10 (C.D. Cal. Dec. 6, 2013) (considering, on  
 motion for default judgment, seven transfers spanning five years).

1 all of which carried a risk of a fee award. It lost at every stage of its lawsuit against  
2 Giganews. Starting in 2014, it suffered adverse court orders nearly every month,  
3 and Giganews requested a substantial sanctions award in August 2014. The Court  
4 itself found that Perfect 10 “was objectively unreasonable” in pursuing its direct  
5 infringement claim with no evidence, making a fee award a significant risk.  
6 SUF224. *Cf. Attebury Grain*, 721 F. App’x at 671–72 (adverse judgment in breach  
7 of contract action was reasonably foreseeable). The timing of the transfers,  
8 together with Zada’s testimony that the summary judgment orders caused his  
9 largest withdrawal, establishes objectively that Perfect 10 had reason to believe it  
10 would suffer an attorney’s fee award.

11 The Court should deny Perfect 10’s motion for summary judgment on the  
12 constructive fraudulent transfer claims, and it should enter partial summary  
13 judgment in favor of Plaintiffs as non-moving parties.

#### 14 **V. CONCLUSION**

15 Nearly three years ago, Norman Zada sat for a debtor’s examination and  
16 forthrightly discussed how he had taken personal possession of Perfect 10’s cash  
17 and property to keep it free from the “interference” of the Court’s judgment. Since  
18 that time, waves of damning evidence of the fraud have emerged. Zada and his  
19 paralegal/bookkeeper/personal assistant/housemate falsified records to disguise  
20 each of his 2014 transfers as loan repayments. Zada misrepresented his cash  
21 position to the Court. Zada either does not know or refuses to identify all the assets  
22 that he transferred. The list goes on. The Court should not allow Zada to escape  
23 the consequences of his behavior and laugh at the law’s impotence. Giganews and  
24 Livewire respectfully request that the Court deny the motion and grant them  
25 summary judgment on their second cause of action for constructive fraudulent  
26 transfer as non-moving parties, as to all of the cash and asset transfers.

1 Dated: November 9, 2018

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